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IN THE

Supreme Court of the United States

October Term, 1958.

No. [redacted]120

JONES MOTOR CO., INC.,
Petitioner,

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Respondent,

and

HIGHWAY EXPRESS LINES, INC. and
MODERN TRANSFER COMPANY, INC.,
Intervening Respondents.

ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA.

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AND

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Intervening Respondents.

ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

I.

COUNTER-STATEMENT OF THE CASE.

On August 5, 1957, there was instituted a complaint against Jones Motor Company, Inc., petitioner herein, for transportation not authorized by its certificates of public convenience, in violation of Article II, Sections 202(b) and 202(c) of the Public Utility Law, Act of May 28, 1937, P. L. 1053, as amended (66 P. S. 1122(b) and 1122(c)).

Jones Motor Company, Inc., filed an answer thereto, in which it admitted the transportation but set up as a defense its certificates of public convenience and necessity issued by the Interstate Commerce Commission at Docket Nos. MC 4963 and MC 4963, Sub No. 7 (R. 18a).

Highway Express Lines, Inc. and Modern Transfer Company, Inc., holders of certificates of public convenience from the Pennsylvania Public Utility Commission, authorizing them to transport, as common carriers, property between certain designated points and areas within Pennsylvania, were granted leave to intervene on the ground that they were adversely affected by the alleged illegal activities of the petitioner.

Thereafter, hearings were held on February 3, 1958 and on June 30, 1958.

The complaint specifically charged Jones Motor Company, Inc., with 22 violations. The illegal shipments alleged included: (1) eleven shipments originating in Philadelphia destined for Allentown, Bethlehem, Easton and Catasauqua; (2) four shipments originating in Easton destined for Philadelphia and Hatboro; (3) three shipments originating in Bethlehem destined for Philadelphia; (4) one shipment originating in Oaks for Bethlehem; (5) one shipment originating in Emmaus for Philadelphia; (6) one shipment originating in Catasaqua for Philadelphia; and (7) one shipment originating in Chester for Bethlehem. Transportation of these shipments has been admitted.

Thereafter, on September 2, 1958, the Pennsylvania Public Utility Commission issued a Long Form Report and Order sustaining the complaint and ordering Jones Motor Company, Inc. to forthwith cease and desist the service for which the complaint was filed.

Jones Motor Company, Inc. appealed to the Superior Court of Pennsylvania from the Order of the Pennsylvania

Public Utility Commission of September 2, 1958 and subsequent thereto Highway Express Lines, Inc. and Modern Transfer Company, Inc. were permitted to intervene as appellees.

The Superior Court of Pennsylvania affirmed the Order of the Pennsylvania Public Utility Commission. Jones Motor Company, Inc. then filed a petition for allowance of an appeal and allocatur with the Pennsylvania Supreme Court. Said petition was denied. A petition for writ of certiorari followed.

II.

QUESTIONS PRESENTED.

In clarification of the questions presented, as set forth in petitioner's brief, the following questions are involved:

A. Whether or Not a Certificate of Public Convenience and Necessity Issued by the Interstate Commerce Commission Authorizing Transportation of Shipments in Bona Fide Operations May Be Utilized to Transport Shipments Between Points in the Same State Where the Use of Such Rights Is a Subterfuge to Avoid and Evade State Regulation.

B. Whether or Not a State May Lawfully Regulate Commerce on Its Highways Involving Transportation Between Two Points in Said State Where the Interstate Commerce Commission Has Not Assumed Jurisdiction to Determine Whether or Not the Operations Are Bona Fide Interstate Commerce.

C. Whether or Not Petitioner May in Its Petition for Certiorari Question the Jurisdiction of the Pennsylvania Public Utility Commission to Regulate Its Activities in Performing Transportation Between Two Points in the Same State Where Said Carrier Has

Failed During All Stages of the Proceedings Before the Pennsylvania Public Utility Commission and the State Courts to Request That State Action Be Enjoined by Seeking Appropriate Relief in the Federal Courts.

D. Whether or Not the Presented Petition Should Be Allowed Where the Uncontradicted Facts of Record Clearly Reveal No Abuse of Discretion by the Pennsylvania Public Utility Commission in Determining That Petitioner's Complained of Operations Were a Subterfuge to Avoid and Evade State Regulation.

III.
ARGUMENT.

A. Whether or Not a Certificate of Public Convenience and Necessity Issued by the Interstate Commerce Commission Authorizing Transportation of Shipments in Bona Fide Operations May Be Utilized to Transport Shipments Between Points in the Same State Where the Use of Such Rights Is a Subterfuge to Avoid and Evade State Regulation.

It has been universally held by the Pennsylvania Public Utility Commission, the Interstate Commerce Commission and the Federal Courts that a certificate of public convenience and necessity issued by the Interstate Commerce Commission authorizes only the transportation of bona fide interstate shipments: See *Ryan et al. v. Pa. P. U. C.*, 143 Pa Superior Ct. 517, 17 A. 2d 637, 39 PUR(NS) 455 (1940), allocatur to the Supreme Court of Pennsylvania refused and certiorari by the United States Supreme Court denied, 314 U. S. 640, 62 S. Ct. 80, 86 L. Ed. 514 (1941); *Atlantic Freight Lines v. Pa. P. U. C.*, 163 Pa. Superior Ct. 215, 60 A. 2d 589 (1948), allocatur to Supreme Court of Pennsylvania refused, certiorari denied by the United States Supreme Court, 336 U. S. 925, 69 S. Ct. 656, 93 L. Ed. 1087 (1949).

In *Service Storage & Transfer Company, Inc.—Petition for Declaratory Order*, 71 M. C. C. 304, the Interstate Commerce Commission in determining the right of Service & Storage Transfer Company, Inc. to perform transportation between two point in Virginia via an interstate route through West Virginia, had the following to say concerning the certificate of public convenience and necessity issued to the said carrier:

"This Commission has found in numerous proceedings that transportation of shipments in *bona fide* operations between points in the same State moving over authorized regular or irregular routes through another State or through an authorized gateway point in another State to which a carrier is authorized to transport a given shipment from a point in a particular State and from which it is authorized to transport the same shipment to a point in the same State, constitutes transportation in interstate commerce. Compare *Dixie Freight Lines, Inc., Common Carrier Application*, 24 M. C. C. 780, and *Atlantic Frt. Lines, Inc.—Petition for Declaratory Order*, 51 M. C. C. 175. In the absence of any showing that petitioner's use of its authorized route is a subterfuge to avoid State regulation, or other than a logical and normal operation through the carrier's headquarters, we are of the opinion that petitioner's operations, in the manner described, constitute *bona fide transportation in interstate commerce*. This conclusion finds support in the fact that the routes employed between Virginia points are not unduly circuitous or impracticable but on the contrary are such as might normally be used by any carrier authorized to operate between the Virginia points involved, and that Bluefield, W. Va., is petitioner's headquarters and the base of other substantial operations to and from points in Virginia of which the operations challenged are only a small part." (Italics supplied.)

It is thus clear that the certificate of public convenience and necessity issued to Jones Motor Company, Inc. by the Interstate Commerce Commission only authorizes "bona fide" operations. If in fact the use of the authorized interstate routes was a mere subterfuge to avoid State regulation, then of course the certificate of public convenience and necessity issued to it would not authorize such transportation. Where as here a subterfuge actually exists an administrative and judicial interpretation of such issue does not

in any way suspend or revoke the carrier's authority to operate in interstate commerce. It is merely an interpretation long recognized by the various administrative agencies and the Courts that where a subterfuge exists a certificate does not in fact authorize the complained of transportation. In such a situation the case of *Castle v. Hayes Freight Lines*, 348 U. S. 61 would have no application. An interpretation is not a suspension or revocation, particularly where as here the uncontradicted evidence clearly revealed that a subterfuge existed.

B. Whether or Not a State May Lawfully Regulate Commerce on Its Highways Involving Transportation Between Two Points in Said State Where the Interstate Commerce Commission Has Not Assumed Jurisdiction to Determine Whether or Not the Operations Are Bona Fide Interstate Commerce.

Congress in its legislative discretion did not completely preclude a State from regulating transportation on its highways, even if such transportation was through another State, particularly where as here the Interstate Commerce Commission has not been asked to and has not on its own motion assumed jurisdiction of the complained of operations.

The jurisdiction of the Interstate Commerce Commission over interstate transportation by motor vehicles, was conferred by the Federal Motor Carrier Act, 1935 (49 U. S. C. A. 301 et seq.).

49 U. S. C. A. 302 (b) reads:

> "Nothing in this Chapter shall be construed to affect the powers of taxation of the several States or to authorize a motor carrier to do an intrastate business on the highways of any State, or to interfere with the exclusive exercise by each State of the power of regulation of intrastate commerce by motor carriers on the highways thereof."

In the present case, Jones Motor Company, Inc. has never formally or informally petitioned the Interstate Commerce Commission to administratively interpret its authority insofar as the complained of operations are concerned. It is clear that such action was open to Jones Motor Company, Inc. if it wished or desired that the Interstate Commerce Commission initially determine the controverted question. See *Atlantic Freight Lines, Inc.—Petition for Declaratory Order*, 51 M. C. C. 175; *Service Storage & Transfer Company, Inc.—Petition for Declaratory Order*, 71 M. C. C. 304.

Your Honorable Court has recognized this principle and has refused to review on at least two occasions the decisions of the Courts of the State of Pennsylvania in similar matters. (See *Rygn et al v. P. U. C.*, 314 U. S. 640 62 S. Ct. 80, 86 L. Ed. 514 (1941); *Atlantic Freight Lines v. Pa. P. U. C.*, 336 U. S. 925, 69 S. Ct. 656, 93 L. Ed. 1087 (1949).

It is also well to note that your Honorable Court did not reverse, interpret or distinguish the above two cases in the recent case of *Service Storage & Transfer Company v. Commonwealth of Virginia*, No. 92 October Term, 1958.

C. Whether or Not Petitioner May in Its Petition for Certiorari Question the Jurisdiction of the Pennsylvania Public Utility Commission to Regulate Its Activities in Performing Transportation Between Two Points in the Same State Where Said Carrier Has Failed During All Stages of the Proceedings Before the Pennsylvania Public Utility Commission and the State Courts to Request That State Action Be Enjoined by Seeking Appropriate Relief in the Federal Courts.

As set forth in the counter-statement of the case, the present controversy was initiated by the filing of a complaint by the Pennsylvania Public Utility Commission

against Jones Motor Company, Inc. Lengthy proceedings were held before the Pennsylvania Public Utility Commission.

Thereafter, Jones Motor Company, Inc. appealed the decision of the Pennsylvania Public Utility Commission to the Superior Court of Pennsylvania.

Thereafter, an appeal and request for allocatur was filed with the Supreme Court of Pennsylvania.

Now, for the first time in a Federal Court Jones Motor Company, Inc. raises the issue of the jurisdiction of the Pennsylvania Public Utility Commission to initially determine the controverted issue. It is true that the Federal question was raised at all times by Jones Motor Company, Inc. It is true that it contended at all times that it had the authority to perform the proposed operations because of its certificate of public convenience and necessity issued by the Interstate Commerce Commission but at no time was the right of the State agency and the State Courts to determine the issue ever questioned in a Federal Court. On the contrary, Jones Motor Company, Inc. urged both the Pennsylvania Public Utility Commission and the State Courts to decide the controverted question in its favor.

Jones Motor Company, Inc. did not at any time while the proceedings were pending before the Pennsylvania Public Utility Commission and the State Courts ask the Federal District Court or any other Federal Court to enjoin the Pennsylvania Public Utility Commission or the State Courts from exercising its jurisdiction in this matter. Such a procedure was open to Jones Motor Company, Inc. if it believed the Pennsylvania Public Utility Commission and the State Courts had no jurisdiction to determine the controverted issue. Further, the Interstate Commerce Commission at no time was asked to assume jurisdiction as was the case in *Atlantic Freight Lines, supra*, and *Service Storage Transfer Co., supra*. For these additional reasons the petition should be dismissed.

D. Whether or Not the Presented Petition Should Be Allowed Where the Uncontradicted Facts of Record Clearly Reveal no Abuse of Discretion by the Pennsylvania Public Utility Commission in Determining That Petitioner's Complained of Operations Were a Subterfuge to Avoid and Evade State Regulation.

The petitioner, Jones Motor Company, Inc. argues that the present proceedings should have been initially brought before the Interstate Commerce Commission pursuant to Section 204(c) of Part II of the Interstate Commerce Act. *Service Storage & Transfer Company, Inc. v. Commonwealth of Virginia, supra,* is cited for this proposition.

It is true that your Honorable Court in the above case stated that such a procedure would avoid confusion and is a proper remedy. It was not, however, conclusively determined that no determination could be made except in this manner. As has been recognized in numerous other cases, the carrier could at any time have petitioned the Interstate Commerce Commission for interpretation of its certificate in relation to the complained of operations. This it did not do. In the present case, however, neither procedure has been pursued and no party has urged that such procedures be adopted. Many and lengthy hearings have been held. The facts concerning the operation are practically uncontradicted. Under the circumstances, it would not be just or meet that the present proceedings be vacated and the case commenced anew. The facts proved before the Pennsylvania Public Utility Commission are before your Honorable Court. A reference to the uncontradicted facts will clearly reveal that a subterfuge existed and does exist. If the facts as now before you clearly reveal no abuse of discretion and if the facts reveal that a conclusion such as reached by the Pennsylvania Public Utility Commission would have to be reached by your Court upon judicial review, then it is clear that your Court may upon

the record and arguments presented in this petition for certiorari dispose of the matter finally and deny said petition. Certainly, Jones Motor Company, Inc., cannot object to your Honorable Court searching the facts and finding that no good cause exists from a factual point of view for the allowance of the present petition. If a procedure were adopted where the Interstate Commerce Commission initially determined the facts, then in the final analysis this Court would determine the legality of any conclusions reached. From the uncontradicted facts presented at this time, no good reason appears as to why the present proceedings should be vacated and since the facts are uncontradicted that a subterfuge exists, then the petition for certiorari should be promptly denied.

In the case of *Service Storage & Transfer Company, Inc. v. Commonwealth of Virginia, supra*, your Honorable Court reviewed the facts with appropriate comments. The proceeding was not remanded and a review of the facts was made with appropriate findings. The facts in the present case are clearly distinguishable from those in *Service Storage & Transfer Company, Inc. v. Commonwealth of Virginia, supra.*

Since full hearings have been held in this matter, it is particularly important that the proceedings before the Pennsylvania Public Utility Commission remain undisturbed. If Section 204(c) of the Interstate Commerce Act, 49 U. S. C. 304(c) were invoked, there is a possibility that such procedure would involve further long, drawn-out hearings without opportunity for an effective Order to be entered by the Interstate Commerce Commission, should it decide that the complained of operations were a subterfuge. In a proceeding under the above Section, the Interstate Commerce Commission would only have the power to determine that such transportation was not interstate commerce but was intrastate commerce. The violations involved then would be merely a matter of State law, namely,

performing transportation between two points in Pennsylvania without having first obtained a certificate of public convenience and necessity from the State Commission. This was the basis for the original complaint filed by the Pennsylvania Public Utility Commission. Since the only finding that the Interstate Commerce Commission could make would be that of a violation of State law, it would be powerless to provide penalties. It would have no authority either to issue a cease and desist order or invoke penalties for the performing of intrastate transportation between points in Pennsylvania without having first obtained a State certificate. The only alternative would probably be for the entire proceeding to commence anew. With the facts now before this Court on the present petition, a final determination can now be made. If the facts sustain the finding that a subterfuge exists then the applicable law can well be applied without the granting of this petition.

The uncontradicted facts with reference to the appropriate pages of the Record are set forth below.

As stated *supra*, when the actual physical movement of the vehicle crosses the State line and back again the question of whether it thereby escapes State regulation depends on whether the movement was "bona fide". Whether the movement was "bona fide" cannot be permitted to depend on the carrier's state of mind. The test must be whether an ordinary prudent carrier not restrained by regulation would use the circuitous route. The simple and easy test is not what the carrier says his purpose is but by what it appears to be from looking at any ordinary highway map.

With the law apparently clear and all factors as considered in other cases to have been established, it now becomes necessary to analyze the testimony taken at the hearings before the Pennsylvania Public Utility Commission to determine the circumstances surrounding the complained of transportation.

The complaint filed by the Pennsylvania Public Utility Commission specifically charged Jones Motor Company, petitioner, with 22 separate violations involving transportation between points in Pennsylvania by routes partially within the State of New Jersey (R. 1a).

Jones Motor Company, Inc., petitioner, has admitted that the transportation complained of involved shipments picked up in Pennsylvania and delivered in Pennsylvania but performed partially through routes in the adjoining State of New Jersey (R. 143a).

Jones Motor Company, Inc., petitioner, through its attorney and throughout the record, has admitted that the 22 instances of transportation complained of involve direct movements between terminal areas in Pennsylvania without any pickups or dropoffs being made at any time on the routes in the adjoining State of New Jersey (R. 217-218).

The record is clear likewise that of the 22 instances of transportation complained of there were no shipments on the trucks involving any interstate shipments as such. Each of the shipments had both origin and destination in Pennsylvania. It is true there is some vague evidence that Jones Motor Company, Inc. at some time does have interstate traffic on the vehicles operating between the Pennsylvania terminals. This was never corroborated by any documentary proof and in fact, the testimony of the witness for Jones Motor Company, Inc. clearly reveals that there just were not any interstate shipments involved in the complained of transportation. The testimony of this witness as shown on the record at 217a and 218a is as follows:

> "A. Not all the time. On these particular days they would have to do that because those trucks move during the night and any traffic for that route is delivered the next day. But, other trucks deliver, that is correct.
>
> Q. But any of the trucks that moved under the circumstances shown on the complaint would be re-delivered from Allentown?

A. If there was any traffic on there.
Q. You have no record of those?
A. We didn't think it necessary.
Q. Your answer to the question is simply yes.
A. (No response.)"

Likewise, it was admitted that the routing between the Philadelphia area and the Allentown-Bethlehem-Easton area involved Route 222 from Allentown to Easton and thence to Clinton, New Jersey, and thence via Route 69 to Trenton, New Jersey, and thence Route 1 to Philadelphia, the same route being used in reverse in the northbound direction (R. 143a). However, Jones Motor Company, Inc. admits that it has no terminal located at the tacking point of its interstate authorities, namely, Clinton, New Jersey, nor does it utilize any terminal in New Jersey nor is New Jersey the "hub" of any of its operations. (See R. 95a and R. 176a.)

As a matter of fact, the "hub" of the operations of Jones Motor Company, Inc., if any exists for shipments from Pennsylvania to points in New Jersey, is the Allentown, Pa. terminal, according to the testimony of the only witness for Jones Motor Company, Inc., petitioner. If this is true, then all the more so the use of the circuitous routes in New Jersey is unjustified.

Likewise, it was established by stipulation of counsel for Jones Motor Company, Inc. and the intervening appellees the distances involved over the circuitous routes utilized by Jones Motor Company, Inc. and the distances over the more direct and normal routes between the Philadelphia area and the Allentown-Bethlehem-Easton area (see stipulation of counsel R. 229a-R. 233a). The distance via the circuitous routes through New Jersey measure approximately 100 miles as compared to 55 miles by the usually traveled most direct intrastate route. (See stipulation of counsel R. 229a-R. 233a and as shown in the findings of the Pennsylvania Public Utility Commission R. 299a.)

Further, by stipulation of counsel the actual normal driving time was admitted in evidence showing the time over the more circuitous route through New Jersey, as well as the normal driving time over the more direct intrastate routes wholly within the State of Pennsylvania. The average driving time via the circuitous route through New Jersey takes approximately 3 hours and 30 minutes, as compared to 2 hours and 15 minutes by the direct intrastate routes. (See stipulation of counsel R. 229a-R. 233a and as shown in the findings of the Pennsylvania Public Utility Commission R. 299a.)

Jones Motor Company, Inc. never attempted to prove any legitimate reason for using the more circuitous routes through New Jersey. The sole reason advanced by it for such a routing appears to be that such routes were authorized by the Interstate Commerce Commission.

It is further shown conclusively that the routing through New Jersey is not the normal route that a prudent carrier would use by the fact that on May 17, 1950 Jones Motor Company, Inc. filed an application with the Pennsylvania Public Utility Commission for amendment of its certificate at application Docket No. 59731, Folder 8, Am-A and Folder 9, Am-A, so as to permit transportation of property between the Philadelphia area and the Allentown-Bethlehem-Easton areas via routes solely within the State of Pennsylvania. Apparently this appeared to even Jones Motor Company, Inc. to be the normally operated routes that a prudent carrier would utilize. The Pennsylvania Public Utility Commission under date of August 23, 1954 issued an Order authorizing such transportation over routes wholly within the State of Pennsylvania. Thereafter, an appeal was taken to the Superior Court of Pennsylvania from said Order and after argument the Order of the Pennsylvania Public Utility Commission was reversed and the application denied. (See *Modern Transfer Company v. P. U. C.*, 179 Pa. Superior Ct. 46, 115 A. 2 887 (1955).)

It was only after the denial of the intrastate application that Jones Motor Company, Inc. became an active competitor between the same areas via the use of the circuitous route through New Jersey. It is also well to note that Jones Motor Company, Inc., stated that the operations via interstate routes through the State of New Jersey had commenced prior to this application but it is further well to note that no documented proof of any kind was presented to substantiate this statement.

On the basis of the above testimony, it is inescapable that the only conclusion that reasonable and fair minds could reach is that Jones Motor Company, Inc.'s use of the circuitous interstate route was and is a subterfuge to avoid State regulation.

The evidence has failed to reveal that the circuitous route was a logical and normal operation. The evidence has failed to prove that the routes were not circuitous and impractical. The evidence has failed to prove that the circuitous routes were those that would normally be used by a prudent and efficient motor carrier.

Under the circumstances, the facts fully justify the Order of the Pennsylvania Public Utility Commission. The Order based upon such facts is fully in accord with the prior decisions of the State Courts and the most recent decision referred to, *supra*, of the Interstate Commerce Commission.

Respectfully submitted,

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